STATE OF MICHIGAN

COURT OF APPEALS

MERLE MINEHART, Plaintiff-Appellee,	UNPUBLISHED February 28, 2012
V	No. 299675 Wayne Circuit Court
KROGER COMPANY OF MICHIGAN, Defendant-Appellant.	LC No. 09-027045-NO

Before: SAAD, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals by leave granted an order denying defendant's motion for summary disposition in this premises liability case. We reverse.

Defendant argues the trial court erred in finding that there was a question of fact regarding the open and obvious nature of the shopping cart bumper plaintiff tripped over and that such an object could have special aspects. We agree.

A grant or denial of a motion for summary disposition is reviewed de novo. *McLean v McElhaney*, 289 Mich App 592, 596; 798 NW2d 29 (2010). A motion for summary disposition under MCR 2.116(C)(10) is reviewed considering the "affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Greene v AP Prods, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006). This Court considers only "what was properly presented to the trial court before its decision on the motion." *Pena v Ingham County Road Com'n*, 255 Mich App 299, 310; 660 NW2d 351 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002). The motion should be granted if "there is no genuine issue in regard to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law." *Pena*, 255 Mich App at 309-310. Moreover, "[a] genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that it did not owe plaintiff any duty because the shopping cart bumper plaintiff tripped over was open and obvious with no special aspects. In a negligence action, the plaintiff must prove the essential

four elements: duty, breach of the duty, causation, and damages. *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007). At issue in this case is the first element, whether defendant owed a duty to plaintiff. Generally, a premises owner "owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). An invitee is a person who enters the owner's land for commercial purposes upon an invitation, "which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make [it] safe for [the invitee's] reception." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000).

While no one disputes that plaintiff was an invitee, what is at issue in this case is if the danger was "known to the invitee or [was] so obvious that the invitee might reasonably be expected to discover [it]." *Lugo*, 464 Mich at 516, quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). If that is the case, then "an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Id*. In other words, if the particular condition created a risk of harm *only* because a particular invitee did not discover it, or did not realize its danger, then the premises owner will not be liable. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995). The standard for determining whether the condition is open and obvious is an objective one, and the test is whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Novotney v Burger King Corp*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

There is no genuine issue of material fact regarding whether the shopping cart bumper was open and obvious. The shopping cart bumper was not an insubstantial or hidden condition but was instead a six inches high, six inches wide, and 11 foot long permanent cement structure. There was a reflective aluminum surface covering the bumper, seen in the photographs provided by both plaintiff and defendant, and such a surface further illuminated it for any invitee in the vestibule. While plaintiff seems to suggest that the dark carpet made the 11 foot long bumper difficult to see, such a fact is not enough to raise a genuine issue of material fact. This Court has held that crushed grape residue, even when compared to the beige supermarket floor, was open and obvious. *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 713-714; 737 NW2d 179 (2007). In comparison, it can hardly be concluded that a cement bumper that rises six inches from the floor and with a reflective surface somehow blended into the dark carpet.

Plaintiff admitted in her deposition that had she looked down she would have seen the bumper. Similarly in *Lugo*, the "plaintiff's testimony at her deposition was that she did not see the pothole because she 'wasn't looking down,'" not because of anything unique about the pothole. *Lugo*, 464 Mich at 521. The *Lugo* Court held that summary disposition was appropriate because "a reasonably prudent person will look where he is going" and a premises owner will not be held liable for a patron's failure to do so. *Id.* at 522-523. Still, plaintiff offered the testimony of defendant's agents as admissions to buttress her argument that there is a material question of fact regarding whether this shopping cart bumper was readily observable by casual inspection. Plaintiff also offered the agent's incident reports that call the bumper a tripping hazard. However, Michigan law provides that a tripping hazard that is readily observable and not unreasonably dangerous or effectively avoidable is still open and obvious. See *Milliken v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 491,497-498; 595 NW2d 152

(1999). Plaintiff also offered testimony of defendant's agent that whether the shopping cart bumper was readily observable depended on the person's perspective. However, the portion of the testimony that directly relates to where plaintiff was standing only indicates that there was little space between the newspaper display and the shopping cart bumper, not that the bumper was hidden.

Even if a condition was open and obvious, a defendant could still owe a duty to plaintiff if special aspects were present. *Lugo*, 464 Mich at 517. That is, if the "special aspects of a condition make even an open and obvious risk unreasonably dangerous, [then] the premises possessor has a duty to undertake reasonable precaution to protect invitees from that risk." *Id.* In other words, to escape the application of the open and obvious doctrine, special aspects need to be present that create a high likelihood of harm or a high risk of severe harm. *Id.* at 518. Something is considered a special aspect if it is unusual in character, location, or surrounding circumstances. *Bertrand*, 449 Mich at 614-617. The focus is not whether the harm was foreseeable, but whether despite its foreseeability, the harm remained unreasonable. *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135, 142-143; 565 NW2d 383 (1997). An objective standard is used to determine whether there are special aspects that transform an open and obvious condition into something that is unreasonably dangerous. *Hoffner v Lanctoe*, 290 Mich App 449, 461; 802 NW2d 648 (2010).

There is no genuine issue of material fact regarding the presence of special aspects. In plaintiff's brief in response to defendant's motion for summary disposition, plaintiff alleged that the newspaper display attracting customers, the narrowness of the aisle, and the lack of shopping carts created a situation that gave no warning to customers and created an unusually high risk of injury. This Court has held that while "shoppers in modern grocery stores are often distracted by displays and merchandise . . . mere distractions are not sufficient to prevent application of the open and obvious danger doctrine." *Kennedy*, 274 Mich App at 716. Such displays are insufficient to prove, or to even suggest, that the premises owners know or should know that customers "would be sufficiently distracted by the displays and merchandise so as to divert [their] attention from this otherwise open and obvious slipping hazard." *Id.* at 718. Thus, the fact that there were newspaper displays and other similar type distractions is insufficient proof of a special aspect.

In this case, the narrowness of the aisle and the lack of shopping carts also do not constitute special aspects. In *Lugo*, our Supreme Court provides examples of what constitutes a special aspect causing a high likelihood of harm or a high risk of severe harm. The *Lugo* Court's example of a high likelihood of harm is when the only exit to a commercial building is flooded with a standing pool of water, so that a patron could not exit safely. *Lugo*, 464 Mich at 518. Taken in the light most favorable to plaintiff, the evidence shows that there was little space between the newspaper stand and the bumper and that when she turned around she immediately tripped over the bumper. Plaintiff, however, does not argue that she had to enter the newspaper aisle in order to exit the store. In fact, there was an alternate exit that plaintiff could have used to safely exit the store. Moreover, even if the analysis were confined to the question of whether plaintiff could safely leave the newspaper aisle, plaintiff still is unable to prove a special aspect existed. While the aisle may have been narrow, customers could, and presumably did, walk around the bumper to leave the aisle safely, and plaintiff provided no evidence on the record that she was somehow trapped in the aisle or could not safely exit the way she entered. See *Joyce v*

Rubin, 249 Mich App 231, 242; 642 NW2d 360 (2002) (explaining that as a plaintiff could and did walk around an icy walkway, she was not effectively trapped and therefore no special aspect existed).

As for what constitutes a high risk of severe harm, the *Lugo* Court gave the example of an unguarded 30-foot deep pit in a parking lot. *Lugo*, 464 Mich at 518. As this Court held in *Joyce*, 249 Mich App at 241-242, the risk the Court in *Lugo* was referring to was a risk of death or severe injury, not a risk of a lesser harm. While it is unfortunate that plaintiff was injured in her fall, the fact remains that tripping over a shopping cart bumper that rises six inches off of the floor is a categorically different type of risk, both in degree and nature, than a 30-foot deep pit. A shopping cart bumper, even considering its location, is not the type of risk that created either a high likelihood of harm or a high risk of severe harm, and thus, there are no special aspects preventing the application of the open and obvious doctrine.

Reversed.

/s/ Henry William Saad
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause